

MANAGING

LEGAL MALPRACTICE RISKS

Presented by: Edward W. Trapolin¹

Irwin Fritchie Urquhart & Moore, LLC.
400 Poydras Street, Suite 2700
New Orleans, LA 70130
Direct: (504) 310-2115
Facsimile: (504) 310-2101
Email: etrapolin@irwinllc.com

¹ Mr. Trapolin is a Member of Irwin Fritchie Urquhart & Moore, LLC and is admitted to practice law in all state and federal courts in Louisiana and Mississippi. He practices primarily in the area of professional liability defense.

I. Introduction

Unfortunately, legal malpractice claims, either through Bar complaints or lawsuits, are increasing. The stigma of lawyers suing lawyers is gone. A simple internet search will disclose numerous law firms advertising as legal malpractice specialists.

Facing a legal malpractice claim can be embarrassing, frustrating, and costly. This presentation is intended to help family law practitioners (and all attorneys) understand what legal malpractice is, what the potential exposures are, and how to manage and/or avoid the risk of being sued by a current or former client, as well as suggest simple ways to manage the risk and to assist in defending legal malpractice claims.

Some legal malpractice statistics:

- In 2007, there were nearly 120,000 disciplinary complaints filed.²
- In the years 2004 through 2007, there were over 40,000 legal malpractice claims filed.³
- Over 14,000 of those claims resulted in the expenditure of defense costs.⁴
- Over 3,000 of those claims involved defense costs exceeding \$25,000.⁵
- 70% of all legal malpractice claims involved solo practitioner firms and lawyers in firms of five or fewer attorneys.⁶

² Mark J. Fucile, *Law Firm Risk Management By the Numbers* (2010) (citations omitted)

³ *Id.* (citations omitted)

⁴ *Id.* (citation omitted)

⁵ *Id.* (citation omitted)

⁶ James Podgers, *Malpractice Minefield, 5 Top Traps -- And How to Avoid Them*, 94-DEC A.B.A J. 54 (Dec. 1994)(citation omitted).

- “The four practice areas that produce [roughly 60% of all] malpractice claims against lawyers are plaintiffs personal injury; real estate; family law; and estate, trust and probate.”⁷
- Family law practitioners account for roughly 10% of all legal malpractice claims.⁸

The good news - more than 75% of all legal malpractice claims are closed without any indemnity payments.⁹ Roughly 15% of claims resolve with payments of less than \$50,000; whereas less than 7% resolve for more than \$50,000.¹⁰

II. Legal Malpractice

A. *What is legal Malpractice?*

To prove a claim for legal malpractice, a plaintiff must prove by a preponderance of evidence that: (1) there was an attorney-client relationship; (2) the attorney was negligent; and (3) that the negligence caused damages. *Spellman v. Bizal*, 99-0723 (La. App. 4 Cir. 3/1/00), 755 So.2d 1013, 1017; *Greyhound Lines, Inc. v. Levy*, 1988 WL 129384, *3 (E.D. La. 1998).

1. The Attorney-Client Relationship.

What Is An Attorney-Client Relationship And How Does A Court Decide?

“A lawyer owes his client great responsibilities and duties and any obligation of such gravity and magnitude may not be involuntarily thrust upon an attorney.” *Olympia Roofing Co., Inc. v. City of New Orleans*, 288 So. 2d 670, 671 (La. App. 4 Cir. 1974)(citing *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, 186 So.2d 454 (La. App. 1 Cir. 1966)). “The attorney-client relationship is contractual in nature and is based upon the **express agreement** of

⁷ James Podgers, *Practice Pitfalls, When It Comes To Potential Ethics Or Malpractice Hazards, Watch Where You’re Going Or Look Out Below*, 95-Dec. A.B.A. J. 46, at 46 (Dec. 1995).

⁸ Lance Kassab, *Legal Malpractice Statistics*, (citing ABA, *Profile of Legal Malpractice Claims; 2000-2003*), available at <http://www.texaslegalmalpractice.com/statistics.htm> (last accessed 10/31/11).

⁹ James Podgers, *Malpractice Minefield, 5 Top Traps -- And How to Avoid Them*, 94-DEC A.B.A J. 54 (Dec. 1994)(citation omitted).

¹⁰ *Id.* (citation omitted).

the parties as to the nature of work to be undertaken by the attorney.” *Grand Isle Campsites, Inc. v. Cheek*, 262 So.2d 350, 359 (La. 1972)(citing *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, 186 So.2d 454 (La. App. 1 Cir. 1966) (emphasis added). “[I]n Louisiana the attorney-client relationship (and therefore the scope of the lawyer’s fiduciary duty to the client) is defined and limited by any contractual agreement between the lawyer and the client as to the scope of the representation.” *Federal Savings & Loan Insur. Corp. v. McGinnins, Juban, Bevan, Mullins & Patterson, P.C.*, 808 F.Supp 1263, 1268 (E.D. La. 1992)(citation omitted).

In *In re: Austin*, 2006-0630 (La. 11/29/06), 943 So.2d 341, 347, the Louisiana Supreme Court recognized that whether a plaintiff has standing to sue an attorney for breach of an applicable standard depends, largely, on “whether an attorney-client relationship existed.” In considering whether an attorney-client relationship existed in that case, the Court considered the standard set forth in the Restatement (Third) Of The Law Governing Lawyers § 14 (2000) that provides, in pertinent part:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services....

Id.

The *Austin* Court noted that the putative client’s subjective belief of an attorney-client relationship must be reasonable and based on objective facts and evidence. *Id.* at 348. See also *St. Paul Fire & Marine Insur. Co. v. GAB Robins North America, Inc.*, 2008-0331 (La. App. 4 Cir. 11/19/08), 999 So.2d 72, 77 (“a person's subjective belief that an attorney represents him

must be reasonable under the circumstances.”) (citing *Exhibition Partner, L.L.P. v. King, LeBlanc & Bland, L.L.P.*, 03-580 (La. App. 4 Cir. 3/10/04), 869 So.2d 934; *Williams v. Roberts*, 06-169 (La. App. 3 Cir. 5/31/06), 931 So.2d 1217.). “The requirement that the belief be reasonable is an objective standard. ‘The claimant's subjective belief does not establish an attorney-client relationship unless the lawyer reasonably induced that belief.’” *Id.* (citing Ronald E. Mallen and Jeffrey M. Smith, 1 Legal Malpractice § 8:3 (2008 ed.).

In *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, 186 So.2d 454, 488 (La. App. 1 Cir. 1966), the court found that, although an attorney-client relationship existed as to one matter, there was no express agreement to extend the current representation into other matters.

Be Careful!!!

In *Keller v. Woods*, 2011 Ky. App. Unpub. LEXIS 114 (Ky. Ct. App. Feb.18, 2011) attorney charged nothing to the client but consulted with him once and wrote one letter concerning easements on a property that plaintiff was interested in purchasing.

In *Allen v. Steele*, 2011 WL 1758788 (Colo. 2011) a personal injury victim consulted attorney about possible negligence action against driver who struck him and attorney allegedly told the victim the wrong statute of limitations applicable to the action. Plaintiff sued for negligent misrepresentation but did not allege an attorney client-relationship. Although the claims were dismissed, had an attorney-client relationship been alleged, the results may have been different.

2. The Standard Of Care.

Okay, so you had an attorney-client relationship, what is the Standard of Care or how is it determined? The standard of care is a local standard. It is not enough to say “That’s the way we do it in St. Tammany Parish.” Or is it?

Initially, the “the Rules of Professional Conduct may be relevant in defining the particular standard of care imposed upon attorneys in most circumstances, they do not provide an independent basis upon which to impose liability upon an attorney for legal malpractice. Thus, proof of the violation of an ethical rule by an attorney, standing alone, does not constitute actionable legal malpractice per se.” *Teague v. St. Paul Fire & Marine Insur. Co.*, 2006-1266, at p. 26 (La. App. 1 Cir. 4/7/09) 10 So.3d 806, 825 (footnote and citations omitted)

“An attorney is obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality, but he is not required to exercise perfect judgment in every instance.” *Quarles Drilling Corp., v. Gen. Accident Insur. Co.*, 538 So.2d 1029, 1032 (La. App. 4 Cir. 1989) (citations omitted). “[T]he jurisprudence regarding legal malpractice is replete with citations to the ‘degree of care, skill, and diligence exercised by prudent attorneys practicing in his community or locality.’” *Herring v. Wainwright*, 32,360 (La. App. 2 Cir. 9/22/99), 742 So.2d 120, 124) (rejecting application of a state wide standard. Standard is that of the attorneys’ community).

Even by reference to local standards, attorneys are not “required to exercise perfect judgment in every instance.” *Quarles*, at 1032. “The question is not whether . . . the advice given was, by hindsight, correct, but rather whether . . . the advice given was the result of the proper exercise of skill and professional judgment under the conditions existing at the time the advice was given.” *Id.* (citations and internal quotations omitted). See also: *Drury v. Fawer*, 527 So. 2d 423, 425-6 (La. App. 4. Cir. 1988) (attorneys cannot be held liable in malpractice if, in hindsight, they could have done things differently); *Schwehm v. Jones*, 2003-0109 (La. App. 1 Cir. 2/23/04), 873 So.2d 1140, 1146 (trial strategy “cannot be questioned in hindsight”). “The fact that an attorney’s judgment in confecting contracts, handling suits, and doing other business

may result in litigation is not, in and of itself, a breach of a duty to the client. Risk of future litigation is often a necessary element or result of legal advice and legal representation.” *Ramp v. St. Paul Fire & Marine Insur. Co.*, 269 So.2d 239, 244 (La. 1972).

“Expert testimony is admissible in legal malpractice cases to establish the standard of care exercised by attorneys in the locality. In certain cases, the opinion of experts may be essential to prove the standard of care an attorney must meet.” *Sunset Insur. Co. v. Gomila*, 834 So.2d 654, 657, 02-633 (La. App. 5 Cir. 12/30/02)(citation omitted). In fact, expert testimony is required to establish the applicable standard of care for the attorneys’ community and locality, unless the “trial court is familiar with the standards of practice in its community, or where the attorney's conduct obviously falls below any reasonable standard of care.” *Morgan v. Campbell, Campbell & Johnson*, 561 So.2d 926, 929 (La. App. 2 Cir. 1990).

“With the complexity and diversity of contemporary law, litigation, and legal practice, it should not be surprising to find legal malpractice cases in which expert testimony as to the standard of care is essential.” *Houillon v. Powers & Nass*, 530 So.2d 680, 682 (La. App. 4 Cir. 1988). Thus, in the absence of expert testimony establish that the local standard of care was breached, the court can dismiss the legal malpractice claims. See, *Edward J. Milligan, Jr., Ltd., v. Keele*, 610 So.2d 1087 (La. App. 3 Cir. 1993)(legal malpractice claims dismissed because of absence of expert testimony regarding local standard of care and whether it had been breached).

3. Damages

There must be a causal connection between the lawyer’s services or lack thereof and the alleged damages.

“Causation . . . is an essential element of any tort claim.” *Jenkins v. St. Paul Fire & Marine Insur. Co.*, 422 So.2d 1109, 1110 (La. 1982). “An attorney is liable to his client for the

damages caused by the attorney's negligence in handling the client's business, providing the client proves by a preponderance of the evidence that such negligence is the proximate cause of the loss claimed." *Arrington v. The Law Firm of Aucoin & Courcelle, L.L.C.*, 02-642 (La. App. 5 Cir. 10/16/02), 832 So.2d 319, 323(citation omitted). See also *Holland v. Hornyak*, 07-394 (La. App. 5 Cir. 11/27/07), - - So.2d - - , 2007 WL 4182003, *2.; *Duhon v. Duhon*, 2003-898 (La. App. 3 Cir. 2/18/04), 867 So.2d 830, 835.

"The proper method of determining whether an attorney's malpractice is a cause-in-fact of damage to his client is whether the performance of that act would have prevented the damage." *Teague v. St. Paul Fire & Marine Insur. Co.*, 2006-1266, p.19 (La. App. 1 Cir. 4/7/09), 10 So.3d 806 (citations omitted). Simply establishing negligent behavior is insufficient to state a claim for legal malpractice. *Id.* Even if an attorney is found to have been negligent, the plaintiff/client may not recover if it is unable to prove any resultant damages. *Rawboe Prop., L.L.C. v. Dorsey*, 2006-0070 (La. App. 4 Cir. 3/21/07), 955 So.2d 177, 182-183. "The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm-not yet realized-does not suffice to create a delictual action." *Braud v. New Eng. Insur. Co.*, 576 So.2d 466, 468 (La. 1991) (citations omitted). See also: *Branton v. Fox*, 2007 WL 4128020, at *18-20 (La. App. 1 Cir. 2007) (citing *Braud*) (legal malpractice does not lie when damages are speculative); *Spellman v. Bizal*, 1999-0723 (La. App. 4 Cir. 3/1/00), 755 So.2d 1013(refusing to find cause of action based on speculative damages that occurred after the attorney withdrew).

An attorney will not be held liable for malpractice where the client's actions are the cause of damage to the client. In *Gill v. DiFatta*, the plaintiff/client gave money under a contract to a group running a confidence game. See *Gill v. DiFatta*, 364 So. 2d 1352 (La. App. 4 Cir. 1978).

He did this against the advice of his attorney, Gill. However, Gill had reviewed the contract and assured DiFatta that it would protect him if the group turned out to be trustworthy. The contract had several deficiencies, and DiFatta sued Gill for negligence in reviewing the contract. The court held that DiFatta's payment of money to the group running a confidence game superceded Gill's negligence, and DiFatta could not recover against Gill for malpractice. *See id.* at 1357.

In *Jure v. Barker*, the plaintiff, unhappy with the result of her medical malpractice action, brought a legal malpractice action against her attorneys while the underlying suit was pending on appeal. *See Jure v. Barker*, 92-1688 (La. App. 4 Cir. 5/27/93) 619 So. 2d 717, 718, *overruled on other grounds by Reeder v. North*, 97-0239 (La. 10/21/97) 701 So. 2d 1291. The court granted the defendant's exception of prematurity on the grounds that the appeal may have rendered the legal malpractice action moot. In doing so, the court stated:

In the context of an action for legal malpractice the Louisiana Supreme Court has held that a cause of action does not exist until the client actually has suffered some damage. ***The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm - not yet realized - does not suffice to create a delictual action.*** Until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice.

Id. (quoting *Braud v. New England Ins. Co.*, 576 So. 2d 466 (La. 1991)) (emphasis added).

4. Who Has The Burden Of Proof And Who Decides?

It depends. Jury or judge in a trial within a trial or judge on appellate success.

In legal malpractice cases involving allegations of a lost opportunity to assert a claim or an appellate remedy, once the client alleges a *prima facie* case, the burden shifts to the attorney to prove that the claim or appeal would not have been successful. *See Jenkins v. St. Paul Fire & Marine Insur. Co.*, 422 So.2d 1109, 1110 (La. 1982); *Rawboe Properties, L.L.C., v. Dorsey*,

2006-0070 (La. App. 4 Cir. 3/21/07), 955 So.2d 177, 182-3; *Broadscape.Com, Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.*, 2003-0904 (La. App. 4 Cir. 2/25/04), 866 So.2d 1085, 1088-90; *Cabot, Cabot & Forbes Co. v. Brian, Simon, Peragine, Smith & Redfearn*, 568 F. Supp. 371 (E.D. La. 1983). If an appeal would not have altered the results, there was no actionable legal malpractice. *Cabot*, 568 F. Supp. at 372. See also *Alfonso v. McIntyre*, 387 So.2d 1348 (La. App. 1 Cir. 1980)(appeal would not have succeeded resulting in dismissal of legal malpractice claim on failure to timely appeal).

In the case of *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So.2d 1109 (La.1982), our supreme court modified the former “case within a case” evidentiary burden of proof in legal malpractice cases. The “case within a case” approach, as its name implied, required a plaintiff in a legal malpractice case to not only prove his former attorney's negligence in handling the underlying legal matter, but also that the underlying claim or litigation would have been successful but for the attorney's negligence. *Id.* at 1109-10. The supreme court summarized its holding as follows:

[W]hen the plaintiff (as in this case) proves that negligence on the part of his former attorney has caused the loss of the opportunity to assert a claim and thus establishes the inference of damages resulting from the lost opportunity for recovery, an appellate court (viewing the evidence on the merits of the original claim in the light most favorable to the prevailing party in the trial court) must determine whether the negligent attorney met his burden of producing sufficient proof to overcome plaintiffs prima facie case.

Teague at p. 28; 10 So.3d at 826.

In cases where the issue does not involve a lost opportunity, but may involve the results of litigation, arguably, the case within a case standard would still apply. In other words, the client would have to prove that, but for the negligence of his attorney, the results would have been different, greater recovery, better verdict, etc.

B. How Long Does My Client Have To Sue Me?

There is no need to look over your shoulder. Nor do you have to have a perfect memory!

Louisiana Revised Statute R.S.: 9:5605 states, in pertinent part, that: “No action for damages against any attorney . . . shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or **within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered.** La. R.S. 9:5605 (A)(emphasis added). “[I]n all events such actions shall be filed at the latest within **three years from the date of the alleged act, omission, or neglect.**” La. R.S. 9:5605 (A)(emphasis added).

“The one-year and three-year periods of limitation . . . are preemptive periods . . . and . . . may not be renounced, interrupted, or suspended.” La. R.S. 9:5605(B). “[P]reemption is a period of time fixed by law for the existence of a right. If the right is not timely exercised within the preemptive period, its extinguished.” *Ascension School Employees Credit Union v. Provost, Salter, Harper & Alford, L.L.C.*, 2004-1227, at pg. 6 (La. App. 1 Cir. 6/10/05), 916 So.2d 252, 256 (citation omitted). “[N]othing may interfere with the running of a preemptive period.” *Id.* (citations omitted). “Thus, if the right to bring such a claim is not exercised within [applicable] time periods, the claim is extinguished.” *Id.* at pg. 11; 258 (citations omitted). “An amended petition adding a new party does not relate back to the original petition to defeat preemption.” *Caillou Island Towing Co., Inc. v. Martin & Pellergrin, CPA’s*, 2009-0795, at pg. 6 (La. App. 1 Cir. 12/9/09), 2009 WL 4668734, *6 (citation omitted).

As clearly stated in the Statute and as noted by the Louisiana Supreme Court in *Reeder v. North*, 97-0239 (La. 10/21/97), 701 So.2d 1291, the preemptive periods set forth in La. R.S. 9:5605 begin to run on the date of the alleged “act, omission, or neglect.”

In *Reeder*, the Court identified the negligent act or omission as the filing of a federal complaint in which the attorney failed to raise all of the client's claims and that resulted in his subsequent attempt to raise those claims being barred by *res judicata*. *Id.* at 1295. It was the filing of that pleading that started the prescriptive period. The *Reeder* Court held that the client's failure to realize the "full extent of his damages" was irrelevant to whether his claims were barred by peremption. *Id.* at 1296. The *Reeder* Court further noted that, because the time periods in La. R.S. 9:5605 are preemptive, neither the continuous representation rule nor the fact that the case was on appeal could suspend or interrupt the running of the period for bringing the malpractice claim. *Id.* at 1297-8.

Recently, the Louisiana Supreme Court, in *Teague v. St. Paul Fire & Marine Insur. Co.*, 2007-1384 (La. 2/1/08), 974 So.2d 1266, explained that "the date of discovery is the date the negligence was discovered or **should have been discovered by a reasonable person in the plaintiff's position.**" *Id.* at 1275 (emphasis added). Constructive knowledge is sufficient to begin the prescriptive clock. *Id.*

Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription.

Id. (citation omitted).

Teague And The Fraud Exception.

The Louisiana Supreme Court in *Teague v. St. Paul Fire & Marine Insur. Co.*, 2007-1384 (La. 2/1/08), 974 So.2d 1266, held that the plaintiff/former client's claims were timely because the attorney withheld information from the client regarding the reason that a settlement was entered into. In that case, the attorney failed to timely post a jury bond and rather than face a

judge trial recommended that the insurer settle the case. The plaintiff, a doctor, only learned of the failure to post the bond when another attorney reviewed the file. It was more than one year after the act but within the three years. The court held that the legal malpractice claim was timely.

Estoppel May Not Be Available.

In *MB Industries, LLC v. CNA Insur. Co.*, 2011-C -0303 C/W 2011-C -0304 (La. 10/25/11), the Louisiana Supreme Court held that a client may have a duty to mitigate his damages, but that the client cannot be required to go to herculean efforts to do so, including exhaustive, expensive, or facially futile appeals.

III. Legal Malpractice In Family Law Cases

A limited number of reported cases address legal malpractice claims originating from the practice of family law. In the majority of those cases, there are two common trends: (1) the legal malpractice claim originated from representation in a divorce-related action such as a child custody dispute; and (2) the only analysis provided by the court concerns whether the malpractice claims had prescribed or were perempted. Unfortunately, analysis of that issue reveals little regarding the pitfalls of family law practice or avoiding legal malpractice in that area of the law.

For example, in *Wong v. Hoffman*, the plaintiff filed a legal malpractice action against the attorneys and law firm that represented her in her divorce proceeding. 2005-1483 (La. App. 4 Cir. 11/7/07); 973 So. 2d 4. The plaintiff's petition, filed on February 5, 2003, alleged four separate acts of malpractice occurring between the summer of 2000 and April of 2002. *Id.* at 9. First, she alleged that the defendant was negligent in the summer of 2000, when he advised her to agree to joint custody. *Id.* at 5-6. The plaintiff claimed that this constituted malpractice

because the defendant knew that her husband had been physically abusive and that she desired to relocate. *Id.* at 6. The plaintiff's second claim was that at a two-day hearing which took place on June 29 and July 31, 2001, the defendant failed to object to testimony of an expert witness who had served as a mediator in the case. *Id.* Third, the plaintiff claimed that on February 14, 2002, the defendant appeared in court on behalf of the plaintiff without her knowledge and signed a consent judgment without her authority. *Id.* Finally, the plaintiff claimed that on April 4, 2002, the defendant failed to object to privileged questions being asked of her at a deposition. *Id.*

At trial, the court granted the defendants' exception of peremption and dismissed the plaintiff's claims. *Id.* The trial court relied on the "continuing representation" rule, holding that the claims could not be broken up into four distinct acts of malpractice and should instead be treated as one entity during the time the defendants represented her. *Id.* at 9 (citing *Taussig v. Leithead*, 96-0960 (La. App. 3 Cir. 2/19/17); 689 So. 2d 680). On appeal, the court rejected this argument, acknowledging that more recent jurisprudence from the Louisiana Supreme Court dictated that "each separate act of malpractice must be considered to be a separate cause of action with its own one-year and three-year preemptive period." *Id.* at 10 (citing *Reeder v. North*, 97-0239 (La. 10/21/97): 701 So. 2d 1291, 1295-96). Thus, the appellate court held that the third and fourth claims were not preempted on their face, and overturned the dismissal of these claims by the trial court. *Id.* For the first two claims, the court accepted that the plaintiff did not learn of the potential acts of malpractice until she consulted with her new attorney after April of 2002. *Id.* Since the petition was filed less than one year later, the appellate court overturned the dismissal of the first two claims as well. *Id.* at 11.

Similarly, in *Creighton v. Bryant*, the plaintiff alleged professional negligence arising from the defendant's representation in her divorce proceeding. 34,893 (La. App. 2 Cir. 6/20/01); 793 So. 2d 275. On the date of her custody hearing, the defendant failed to show up to court, so the judge continued the case until the next day. *Id.* at 277. The following day, the defendant arrived five minutes before the hearing, tried unsuccessfully to continue the case, then obtained the plaintiff's consent to a judgment that awarded joint custody and no child support. *Id.* Furthermore, the plaintiff claimed that the defendant told her that it was a temporary order that could be changed. *Id.*

Unsatisfied, the plaintiff sought advice from another attorney in November of 1997. *Id.* This attorney advised the plaintiff to file a complaint with the bar association regarding the defendant's representation, which she did in April of 1998. *Id.* She did not, however, file the legal malpractice suit until March of 1999. *Id.*

The court summarized the plaintiff's malpractice claims against the defendant as follows: (1) attorney's failure to prepare for court proceedings; (2) failure to obtain domiciliary parent status with longer periods of child custody; (3) failure to obtain monthly child support payments; and (4) misinforming the plaintiff that the courts initial order regarding custody and child support was an interim order and could be changed at any time. *Id.* at 279. Although the plaintiff claimed that she did not fully understand the ramifications of the defendant's negligence until 1999, the advice she received during he meeting with the other attorney in 1997 was sufficient to put her on notice. *Id.* at 279. This triggered the running of the one-year prescriptive period, and since she did not file the malpractice suit until 1999, the court held that the claims had prescribed.

Yet another similar example of this trend is *Granger v. Middleton*, in which the plaintiff sued his attorney for legal malpractice while representing him in a child custody dispute. 2006-1351 (La. App. 3 Cir. 2/7/07); 948 So. 2d 1272. After the trial court in the child custody matter ruled adverse to the plaintiff, he ended his retention of the defendant in 2001. *Id.* at 1273. In spring of 2003, he filed a disciplinary complaint against the defendant for overbilling and failure to memorialize a mediated custody agreement, and, in November of 2004, he filed the legal malpractice action. *Id.* The court held that the plaintiff knew of the alleged malpractice in 2003 when he filed the disciplinary action, and since it was more than one year later when he filed the malpractice suit, “the action had prescribed on its face.” *Id.* at 1274.

Jarrell v. Miller

The following case provides perhaps the best available example of the common pitfalls surrounding family law malpractice. The lengthy case description below is provided in detail to help highlight some of the common ways family law practitioners might find themselves faced with a malpractice suit.

In *Jarrell v. Miller*, a former client brought a legal malpractice action alleging economic harm as a result of his former attorney’s misconduct and negligence. 38,882 (La. App. 2 Cir. 9/9/04); 882 So.2d 639, 641. Mr. Jarrell and his wife were the sole shareholders and officers of Jarrell Transport, Inc. (“JTI”), and each spouse owned 50% of the company. *Id.* at 642. Miller was originally hired to represent JTI in a lawsuit and bankruptcy proceeding. *Id.* However, his representation entered the family law realm when Mr. Jarrell was hospitalized for severe alcohol problems, and Miller was asked to prepare an act of partial partition of community property so that Mrs. Jarrell could carry on JTI’s business. *Id.* He drafted a document transferring all of JTI’s stock to Mrs. Jarrell, and Mrs. Jarrell took it to her husband for his review and signature.

Id. Miller testified that the document was only a draft, and that he was surprised when it was returned to him signed by Mr. Jarrell. *Id.* Furthermore, Miller claimed that he instructed Mrs. Jarrell to again review and discuss the document with Mr. Jarrell, and that she later confirmed that Mr. Jarrell understood the document. *Id.* Conversely, Mr. Jarrell claimed to have intended to donate only 2% of his stock to his wife so that she could conduct JTI's business, and he signed the document without reading it. *Id.* When Mr. Jarrell ultimately left the hospital, he got drunk, threatened his wife, and "generally wreaked havoc on JTI's property." *Id.* Miller then further inserted himself into the family law arena when he filed for divorce on behalf of Mrs. Jarrell and obtained restraining orders against her husband. *Id.*

Later, in hopes of obtaining a loan to keep JTI in business, as settlement was proposed under which Mr. Jarrell would receive 49% of JTI's stock while Mrs. Jarrell would maintain 51% and remain president of the company. *Id.* at 643. When this attempt to settle failed, Mr. Jarrell claimed that the instability of JTI caused the loan to be denied and led to the company's failure. *Id.* Subsequently, Mr. Jarrell filed a legal malpractice suit against Miller for "Miller's misconduct and negligence in handling the broad scope of duties accepted by [Miller] as Mr. Jarrell's attorney." *Id.* at 641. Mr. Jarrell claimed economic damages for the loss of his job and stock in the company that he and his wife had founded and operated for 27 years, and general damages for emotional distress caused by Miller's malpractice. *Id.* at 641-42. The jury rendered a verdict for Jarrell awarding \$500,000.00 in general damages, \$623,110.00 in lost wages, and \$227,175.00 for lost value of the stock. *Id.* at 643.

On appeal, the court first held that Mr. Jarrell had not shown that any of his claimed economic damages were caused by Miller's alleged acts of malpractice. *Id.* at 644, 646. In addressing economic damages, the court rejected Mr. Jarrell's claim that Miller was deceitful in

the presentment of the partition which transferred 100% of JTI's stock to Mrs. Jarrell. *Id.* at 645. The determinative factor for the court was jurisprudence stating that it is assumed that a person who signs a written contract knows its contents and cannot avoid its obligations by claiming that he did not read or understand it unless there was misrepresentation, fraud, or violence. *Id.* (citing *Tweedel v. Brasseaux*, 433 So. 2d 133 (La. 1983)). The absence of fraud was evidenced by the testimony that Miller had expressed concern about Mr. Jarrell's understanding of the document and that Mrs. Jarrell had assured him that Mr. Jarrell understood the contents and ramifications of the document. *Id.* The court also cautioned that there might have been some merit to the argument that a client might sign a document prepared by his attorney without reading it. *Id.* However, the court did not further address the issue and rejected economic damages on other grounds.

The court then addressed the award of general damages for emotional distress in a legal malpractice action.

Damages for pain, suffering, anxiety, and humiliation caused by negligence are generally not recoverable in a legal malpractice action. This is because the foreseeable result of an attorney's negligence typically extends only to an economic loss. Obviously, a client will be annoyed and inconvenienced by an attorney's failure, for example, to file suit within the applicable time limits; however, the client can be fully compensated by recovery of the value of the claim the attorney allowed to prescribe. This suffices to return the client to his prior circumstances. The primary interest protected by the general rule is a property right which can be economically measured. Serious emotional distress is not believed to be an inevitable consequence of a purely monetary loss.

Id. at 646 (citations omitted). Moreover, the court recognized a line of legal malpractice cases where the original claim was not monetary or economic, such as disputes over child custody or visitation rights. *Id.* "Not to allow mental anguish damages under these limited circumstances would leave such a client without a remedy and virtually immunize the negligent attorney." *Id.*

at 647. In these cases, the court suggested that the focus should shift from the nature of the attorney's conduct to the nature of the plaintiff's loss. *Id.*

In addressing the above issue, the court did make several important observations. Notably, the court stated that Miller should have personally explained to Mr. Jarrell the ramifications of the community property partition. *Id.* This was not determinative however, because there was no evidence of intent to deceive. *Id.* The court also reasoned that as JTI's attorney, both Mr. and Mrs. Jarrell were arguably Miller's clients, and he should not have filed the action for divorce or the restraining on behalf of Mrs. Jarrell against Mr. Jarrell. *Id.* However, the court noted that if Miller had not represented Mrs. Jarrell, another attorney would have. *Id.* Although Miller did use poor judgment and acted improperly during his representation of Mr. Jarrell, his wife, and their corporation, the court found that the mental anguish and emotional distress Jarrell claims to have suffered was the result of his own actions, not Miller's. *Id.* Thus, the court concluded that general damages were not warranted. *Id.*

Jarrell provides a number of useful takeaways for family law practitioners. First, although Miller was originally hired to represent the Jarrells' company, he ultimately practiced family law in drafting the community property partition and representing Mrs. Jarrell in the divorce proceedings. As the court pointed out, this was an exercise of poor judgment that created a number of possible conflicts. As JTI's attorney, Miller was arguably the attorney for both Mr. and Mrs. Jarrell as well, and he therefore created a conflict when he represented Mrs. Jarrell in the divorce proceeding. Additionally, drafting the community property partition potentially brought his duties to the company against the interests of the Jarrells'.

Another useful lesson is that family law practitioners should be careful in their decisions to allow clients to provide services for them. When Miller sent Mrs. Jarrell to explain the draft

partition to Mr. Jarrell, he was essentially asking her to provide a service that he as an attorney should have himself performed. This is evidenced in the court's assertion that Miller should have personally explained the ramifications of the community property partition to Mr. Jarrell in order to avoid a claim of fraud or wrongdoing. Furthermore, as the court pointed out, there may be merit to the argument that a client may sign a document prepared by his attorney without reading it.

Finally, the court's analysis of general damages is instructive, particularly for attorneys who practice family law. Although the rule is that general damages are prohibited in legal malpractice claims, the court acknowledged that there are certain instances where the underlying claim involved no economic damages. In those cases, such as *disputes over child custody or visitation rights*, the court held that general damages are acceptable because the client would be left without a remedy. Since the analysis in these types of cases shifts to the conduct of the attorney, family law practitioners should be very cautious to avoid potentially large awards for mental anguish damages.

IV. Back to Statistics

The top five sources of legal malpractice claims are:

1. Substantive errors: 46% of all reported legal malpractice claims, “dabbling” - not familiar with the substantive area of law, failure to know or understand applicable or local procedures, including deadlines;
2. Administrative errors: 28% of all reported legal malpractice claims; failure to calendar, lost files or documents, clerical and delegation errors, calculation errors, overlooking or missing calendared deadlines (tickler);

3. Intentional wrongs: fraud, malicious prosecution, abuse of process, defamation, civil rights violations;
4. Client-relations errors: failure to follow client instructions, failure to obtain client consent or lack of informed consent, and poor communications with the client about the process, timing, costs (fees and , expectations, likelihood of success; and,
5. Conflicts of interest.¹¹

V. What You Can Do To Minimize Your Exposure?

As a professional liability/legal malpractice defense lawyer, besides knowing the law, making sure you have proper calendaring and controls- my experience shows that many, many legal malpractice suits and even bar complaints would be avoided if you would just:

PAPER YOUR FILE!!!

- Provide a retention letter.
- If you do as a matter of course, draft better and clearer retention letters.
- Provide rejections letters.
- Provide file closing letters.
- If you do, do better and clearer rejection letters.
- Regularly send letters and emails to client advising of progress, direction and confirming communications and instructions.
- Regularly print substantive emails for your file or digitally archive in some fashion.
- Keep file notes or a practice journal, diary.
- Don't be afraid to fire a client.

¹¹ Daniel E. Pinnington, ABA Practice Management, *The Biggest Malpractice Risks*, 28 No.2 GPSolo 18 (March 2011)

- When all else fails keep time sheets, even in lump sum cases. But make sure that the time sheet/entries are specific and detailed. Include: Date, time, person(s) present, content of conversation, task undertaken, description of actual effort, issue researched, decisions made, persons conveyed to, etc.
- **Keep your license active at all times, pay your dues, maintain CLE, file your IOLTA forms.**